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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

DISTRICT 1199C, NATIONAL UNION OF
HOSPITAL AND HEALTH CARE EMPLOYEES,
DIVISION OF RWDSU, AFL-CIO,
Petitioner,

v.

SAUNDERS HOUSE, a/k/a
THE OLD MAN'S HOME OF PHILADELPHIA,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of
Appeals for the Third Circuit

BRIEF OF RESPONDENT SAUNDERS HOUSE,
a/k/a THE OLD MAN'S HOME OF PHILADELPHIA,
IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a court of appeals required to enforce an order of the National Labor Relations Board when there is not substantial evidence in the record to support the Board's conclusion that no impasse in collective bargaining existed to justify an employer's unilateral wage increase?

2. Is there any reason why the Supreme Court of the United States should create a new exclusionary rule forbidding consideration of relevant, credible, and material evidence in deciding whether an impasse existed in negotiations for a collective-bargaining agreement?

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STATEMENT

By its Petition for Writ of Certiorari, District 1199C, National Union of Hospital and Health Care Employees, Division of RWDSU, AFL-CIO (the "Union"), seeks to have this Court review and reverse a unanimous decision of the United States Court of Appeals for the Third Circuit which refused to enforce an Order of the National Labor Relations Board ("NLRB" or the "Board"), issued against Saunders House, a/k/a The Old Man's Home of Philadelphia ("Saunders House"), for an alleged violation of Sections 8(a)(1) and (5) of the National Labor Relations Act (the "Act"). Petitioner neither filed a brief nor even participated in oral argument in the court of appeals (the "court"). Saunders House's real opponent in the court of

appeals, the NLRB, was apparently satisfied with the decision of that court, having chosen not to seek either rehearing en banc or review by this Court.

From September 16, 1980 until April 15, 1981, the Union and Saunders House engaged in negotiations for a collective bargaining agreement. (180a).¹ On April 15, 1981, after what the Union president described as "the longest negotiations in the Union's history," (64a, 100a), an impasse in negotiations had admittedly been reached. (143a, 399a). Recognizing that an employer has the right to institute unilateral changes in terms and conditions of employment after it has bargained in good faith to impasse

1. "a" references are to the Appendix in the United States Court of Appeals for the Third Circuit.

(so long as the changes are reasonably comprehended within its pre-impasse proposals), Saunders House implemented its pre-impasse wage proposal on April 22, 1981. (Pet. App. 12A).² Because Saunders House's good-faith bargaining was undisputed (Pet. App. 15A), the ultimate issue for decision in this case was simply whether the impasse still existed at the conclusion of the parties' final bargaining session on April 15, thereby justifying Saunders House's wage increase one week later on April 22.

Throughout the entire course of the proceedings below, the NLRB asserted that "movement" or "modifications" occurred in the Union's position on April 15, 1981, sufficient to break the admitted impasse. For example, in his opening statement at

2. "Pet. App." refers to the Appendix to the Petition for Writ of Certiorari.

the hearing before the Administrative Law Judge, counsel for the General Counsel stated:

"[I]t is our contention that even if an impasse existed prior to April 15th, the impasse was clearly broken by the modifications that the Union made in the proposal of April 15th. . . . [T]hat is our theory of the case." (29a).

Moreover, the Board in its Decision persistently alluded to the supposed "movement" and "real concessions" on the Union's part that purportedly occurred on April 15. (Pet. App. 17A-19A). The gist of the Board's theory was that these "real concessions" were embodied in the Union's transformation of its February 20, 1981 "off-the-record" wage proposal into an identical "on-the-record" offer on April 15, 1981. (Pet. App. 17A-18A).

Applying the appropriate standard of review and giving deference to the expertise of the NLRB, the United States Court of Appeals for the Third Circuit still decided that there was "not substantial evidence in the record to support the Board's conclusion that the parties were not at impasse and that the employer's unilateral wage increase constituted an unfair labor practice." (Pet. App. 119A). The court stated:

"[A] mere shift from a position off the record to one on the record is not a concession sufficient to preclude a finding of impasse. The union did not propose anything on April 15 that it had not presented to the employer at an earlier date; there was in fact no real movement and the employer so notified the union by letter the next day." (Pet. App. 119A).

Such a conclusion was clearly in compliance with the standard consistently

applied by the Board and the courts in determining whether an impasse exists -- i.e., that there be "no realistic possibility that continuation of discussion at that time would have been fruitful."

NLRB v. Beck Engraving Co., 522 F.2d 475, 484 n.16 (3d Cir. 1975), quoting American Federation of Television & Radio Artists v. NLRB, 395 F.2d 622, 698 (D.C. Cir. 1968) (emphasis added).³

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3. See also Excavation-Construction, Inc. v. NLRB, 660 F.2d 1015, 1020 (4th Cir. 1981); H & D, Inc. v. NLRB, 665 F.2d 257, 259 (9th Cir. 1980), vacated on other grounds, 455 U.S. 902 (1982); NLRB v. Independent Ass'n of Steel Fabricators, Inc., 582 F.2d 135, 147 (2d Cir. 1978), cert. denied sub nom. Shepmen's Local Union No. 455 v. NLRB, 439 U.S. 1130 (1979); Patrick & Co., 248 N.L.R.B. 390, 393 (1980); Providence Medical Center, 243 N.L.R.B. 714, 731 (1979). The Supreme Court disagreed with Beck, H & D, Inc., and Steel Fabricators

(Footnote continued on next page)

ARGUMENT

The Union has asked this Court to grant certiorari to decide two questions which it argues merit review. Even if the court of appeals had committed the errors with which it is charged, however, these are not questions which need or are entitled to this Court's attention since there are no "special and important reasons" for certiorari to be granted. Sup. Ct. R. 17. Furthermore, it is respondent's position that the court of appeals did not make any errors, and that there was ample basis for that court's decision.

(Footnote continued from previous page)

on other grounds in Charles D. Bonnano Linen Serv., Inc. v. NLRB, 454 U.S. 404 (1982) (holding that an impasse is not such an "unusual circumstance" as to justify unilateral withdrawal from a multiemployer bargaining unit).

I.

DISTRICT 1199C'S PETITION RAISES
NO QUESTIONS WHICH DESERVE CON-
SIDERATION BY THIS COURT.

Although the succeeding sections of this brief answer each of petitioner's questions on the merits, we begin by noting that neither of those questions deserves consideration by this Court under the standards of Supreme Court Rule 17.

The principal question raised by the Union in its Petition for Writ of Certiorari is whether there was substantial evidence on the record as a whole to support the NLRB's finding of no impasse. This is the very same question that was raised in the court of appeals and that was thoroughly considered by that court. The Congress and this Court have already established the standards for appellate court review of NLRB findings of this

type, and the court applied those standards in a manner fully consistent with this Court's guidelines and in harmony with the decisions of the other courts of appeals which have faced the same issue. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-88 (1951).⁴ Here, the Union is simply asking that the same standards be applied all over again, and there is no reason for this Court to do so. As the Universal Camera Court stated: "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals." (Id.).

4. See also cases cited at note 3 supra.

Almost as an afterthought,⁵ petitioner also argues that this Court must review and reverse the decision of the court of appeals because, otherwise, the judicial system will be engulfed by cases in which employers attempt to use "off-the-record" union proposals to justify a finding of impasse on the ground that, when the Union later made the same proposal "on the record," the employer already knew what the Union would accept.

The first and most obvious answer to this argument is that it is perfectly permissible to consider "off-the-record discussions" in finding impasse if those discussions, as here, show that there is no realistic possibility of reaching

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5. In the 20-page Argument section of its brief, the Union devoted a mere 3 pages to this theory.

agreement. Second, should there be other employers in the future who raise this issue, they would also be entitled to prevail if the facts are the same as these. Quite frankly, however, it is difficult to conceive of any flood of such cases engulfing the courts. In fact, in the entire history of collective bargaining in this country, the instant case apparently represents the first time that this specific issue has been presented in a court of appeals. The absence of prior appellate court rulings on this issue is understandable since the question is completely fact dependent -- i.e., off-the-record proposals will only be considered after a factual finding that such proposals were actually made (as the Administrative Law Judge found in this case). Obviously, fact-dependent matters such as this do not

merit this Court's attention, especially one which occurs so infrequently.

Third, the court of appeals' consideration of the off-the-record proposal as evidence of impasse was completely consistent with the standard generally applied by the Board and the courts in determining whether an impasse exists -- that there be "no realistic possibility that continuation of discussion at that time would have been fruitful."⁶ Finally, consideration of the off-the-record proposal presented no conflict with any existing Board law since informal private discussions between union and management negotiators have been found to be relevant considerations in determining whether impasse has been reached. See Providence

6. See cases cited at note 3 supra.

Medical Center, 243 N.L.R.B. 714, 730-31 (1979).

In short, even assuming arguendo that the Union is correct in its view of the opinion below, it has failed to show any "special and important reasons" why this Court should review this case.

II.

THE COURT OF APPEALS CORRECTLY DECIDED THAT THERE WAS NOT SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE NLRB'S CONCLUSION THAT NO IMPASSE IN COLLECTIVE BARGAINING EXISTED TO JUSTIFY SAUNDERS HOUSE'S UNILATERAL WAGE INCREASE.

Since good-faith negotiations were at impasse when Saunders House implemented its pre-impasse wage proposal on April 22, 1981, its conduct was lawful. The NLRB's technical finding that no impasse existed on that date because some sort of Union "movement" had occurred on

April 15 is totally unsupported in the record, is contradicted by the Board's own findings, and is inconsistent with prior Board and court case law. Further, there was overwhelming evidence that on April 15 & 22, 1981, no such "movement" had occurred and impasse clearly existed on a number of unresolved, mandatory subjects of bargaining. Therefore, the court of appeals properly denied enforcement of the Board's Order.

A. The Court of Appeals
Correctly Applied the
Appropriate Standard
of Review.

The thrust of the Union's argument in its Petition is that the court of appeals erred in failing to find substantial evidence in the record to support the Board's finding that impasse did not exist on April 22, 1981. The Union contends

that, because the Board's finding of no impasse was a "purely factual determination" peculiarly suited to NLRB expertise, the court must have substituted its own findings of fact in order to conclude that an impasse existed. The Union argues that, although the court of appeals acknowledged the narrow standard of review applicable to this case -- i.e., the substantial evidence test -- it ignored that standard and violated public policy by disagreeing with the NLRB.

The Union's unwillingness to accept the opinion below rests on its failure to understand that much more than a "purely factual determination" was involved in this case. As Chief Justice Burger recently observed, "unions and employers have important rights which arise upon impasse." Charles D. Bonnano Linen

Service, Inc. v. NLRB, 454 U.S. 404, 426 (1982) (Burger, C.J., dissenting). One of those important rights is the privilege of instituting unilateral changes in terms and conditions of employment after a good-faith bargaining impasse has been reached.

Saunders House demonstrated in the court of appeals that the NLRB proffered a patently irrational argument in attempting to support its finding that "movement" occurred on April 15 sufficient to break the admitted impasse. Saunders House further demonstrated that, far from providing "substantial evidence" for its finding, the Board set forth no evidence whatsoever for its conclusion, repeatedly misrepresented the record, and ignored or misstated prior Board and court case law. It was under these

circumstances, when Saunders House was unfairly about to be denied an important right, that the court performed its duty and refused to enforce the Board's Order. The court did not make any determinations regarding underlying facts different from those of the Board; it merely reasoned that, accepting those facts exactly as the NLRB had found them, there was not substantial evidence to justify the Board's ultimate conclusion of no impasse.

It is well settled that an NLRB finding of no impasse may not be enforced unless it is supported by substantial evidence on the record considered as a whole. See Excavation-Construction, Inc. v. NLRB, 660 F.2d 1015, 1019 (4th Cir. 1981); see also Universal Camera Corp. v. NLRB, supra, 340 U.S. at 488. That standard does not reduce appellate judges to

the status of "automata." Id. at 489.

Before a court of appeals can reach a final decision on whether an NLRB order may be enforced, it must carefully assess "whatever in the record fairly detracts from" the Board's decision. Id. at 488.

Courts of appeals have not hesitated to reverse NLRB findings of no impasse when the "record amply supports the conclusion that the parties were at loggerheads."

NLRB v. Beck Engraving Co., supra, 522 F.2d at 484.'

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7. See also Excavation-Construction, Inc. v. NLRB, supra, 660 F.2d at 1019-20, 1023 n.4 (rejecting NLRB's conclusion that there was no impasse); H & D, Inc. v. NLRB, 665 F.2d 257, 259-60 (9th Cir. 1980), vacated on other grounds, 455 U.S. 902 (1982) (same); NLRB v. Independent Ass'n of Steel Fabricators, Inc., 582 F.2d 135, 146-48 (2d Cir. 1978), cert. denied sub nom. Shopmen's Local Union No. 455 v. NLRB, 439 U.S. 1130 (1979) (same).

In the court of appeals, Saunders House demonstrated by a careful, point-by-point analysis of the Union's April 15th proposal that no movement in the Union's position occurred on April 15, and that the parties were still at loggerheads on April 22, 1981. In its brief to the court of appeals, Saunders House presented the following chart to illustrate graphically that every proposal that the Union made on April 15 as to an open issue was identical to a position that the Union had previously announced.

THE UNION MADE NO MOVEMENT
WHATSOEVER IN ITS APRIL 15, 1981, OFFER

<u>ITEM</u>	<u>UNION'S POSITION IN OFFER OF APRIL 15, 1981</u>	<u>UNION'S POSITION PRIOR TO OFFER OF APRIL 15th</u>	<u>DATE AND MANNER OF UNION'S COMMUNICATION OF ITS POSITION PRIOR TO APRIL 15th</u>	<u>RECORD REFERENCE</u>
WAGES	81-81-81	81-81-81	February 20, 1981, meeting between Abbott and Ford	WLAB Decision A. 448a; <u>see also</u> A. 136a, 152-23a 414-15a
(COST OF LIVING CLAUSE)	COLA Clause Dropped	COLA Clause Dropped	March 5, 1981, Nego- tiating Session	WLAB Decision A. 449a; <u>see also</u> A. 88-89a, 113a, 141a, 155a
UNION SECURITY	Modified Union Shop	Modified Union Shop	February 20th meeting between Abbott & Ford; March 30, 1981, Nego- tiating Session	WLAB Decision A. 449-50a; <u>see also</u> A. 114-15a, 136a, 414-15a, 418a
GRIEVANCE PROCEDURE	Guaranteed Hearing at Each Step	Guaranteed Hearing at Each Step	Presented as Part of Union's Proposal to Fact-Finder on March 16, 1981	Joint Ex. 10 (A. 392a); <u>see also</u> A. 63a
UNION ACTIVITY	As Stated in Union's Original Contract Proposal	As Stated in Union's Original Contract Proposal	Part of Union's Pro- posed Contract Submitted at September 9, 1980, Negotiating Session	Joint Ex. 5(h) (A. 211-10a); <u>see</u> <u>also</u> A. 65a
DUSS CHECKOFF	As Stated in Union's Original Contract Proposal	As Stated in Union's Original Contract Proposal	Part of Union's Pro- posed Contract Submitted at September 9, 1980, Negotiating Session	Joint Ex. 5(h) (A. 194-20a); <u>see</u> <u>also</u> A. 64a
SICK LEAVE	Beginning on First Day of Illness	Beginning on First Day of Illness	Part of Union's Pro- posed Contract Submitted at September 9, 1980, Negotiating Session	Joint Ex. 5(h) (A. 197-20a); <u>see</u> <u>also</u> A. 65-66a
REINSTATEMENT OF DISCHARGED EMP-	Discharged Employees Need Not Be Rehired	Discharged Employees Need Not Be Rehired	March 30, 1981, Nego- tiating Session	A. 110a

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In light of this evidence in the record which "fairly detracted" from the Board's decision, the court correctly applied the substantial evidence test and concluded that an impasse had occurred.

The Union obviously would have preferred for the court to have simply deferred to the Board's presumed expertise and to have rubber stamped its finding of no impasse. As Chief Justice Burger recently stated, however, both "the Board and the courts have acquired considerable experience in determining whether an impasse exists." Charles D. Bonnanno, supra, 454 U.S. at 426 (Burger, C.J., dissenting) (emphasis added). Similarly, the court has also recognized that "an agency is not the exclusive repository of technical expertise." Hi-Craft Clothing Co. v.

NLRB, 660 F.2d 910, 915 (3d Cir. 1981).

As the H1-Craft court observed:

"Blind acceptance of agency 'expertise' is not consistent with responsible review.

"When the agency diet is food for the court on a regular basis, there is little reason for judges to subordinate their own competence to administrative 'expertness.'" Id.

Under the circumstances of this case where much more than a "purely factual determination" was involved, the court properly refused to subordinate its own competency to NLRB "expertness" and correctly applied the substantial evidence test in concluding that the conduct of Saunders House was legal."

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8. The Union's reliance on the majority opinion in Charles D. Bonnano is misplaced since a totally different

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- B. There is No Reason for This Court to Create a New Exclusionary Rule Forbidding Consideration of Relevant, Credible, and Material Evidence in Deciding Whether an Impasse Exists in Negotiations for a Collective-Bargaining Agreement.

As noted above, the NLRB theorized that "movement" and "real concessions"

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standard of review applied in that case. The issue before the Bonnano Court was whether an admitted bargaining impasse is such an unusual circumstance as to justify an employer's withdrawal from a multiemployer bargaining unit. 454 U.S. at 407, 412. In deciding this issue, the Court applied the "arbitrary/contrary to law" standard of review in determining that the Board had properly exercised its judgment in balancing conflicting union and employer interests. Id. at 413. In the present case, on the other hand, the reviewing court appropriately applied the "substantial evidence" test in deciding that there was not substantial evidence in the record to support the Board's finding of no impasse.

occurred on April 15, 1981, when the Union transformed its February 20, 1981 "off-the-record" wage proposal into an identical "on-the-record" offer. (Pet. App. 17A-18A). Saunders House demonstrated to the court that the Union's purported movement on wages -- i.e., converting its specific (not "intimated") February 20th proposal into an on-the-record offer -- was clearly not a "real" concession or any concession at all. To have required Saunders House to disregard what it already knew to be the Union's bottom line, and pretend that the Union had "moved" on wages, would have been to ignore the courts' and the Board's very definition of impasse -- "no realistic possibility" that continuing discussion would be fruitful."

9. See cases cited at note 3 supra.

The court agreed that the Union made no movement, concluding that "a mere shift from a position off the record to one on the record is not a concession sufficient to preclude a finding of impasse." (Pet. App. 119A). Viewing the matter realistically, the court observed that "[t]he Union did not propose anything on April 15 that it had not presented to the employer at an earlier date; there was in fact no real movement and the employer so notified the Union by letter the next day." (Id.). Additionally, the court noted:

"The employer put the Union on notice in that letter that unless the Saunders House final offer was accepted by April 22, it would put the proposed wage increase into effect. This increase was not greater than the one offered by the employer at the bargaining table. The Union, however, continued to adhere to its position." (Id.).

Thus, the parties' conduct after April 15, 1981, reaffirmed the impasse which existed on that date. Requiring Saunders House to do anything more at that point would have been to force it "to agree to a proposal or require the making of a concession" -- something which the Act specifically says the employer is not compelled to do. 29 U.S.C. § 158(d). As this Court has stated:

"[A]llowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based -- private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." H.K. Porter v. NLRB, 397 U.S. 99, 108 (1970).

Nevertheless, the Union in its petition argues that this Court must review

and reverse the decision of the court because otherwise,

"every time an off-the-record conversation between negotiators is converted by one party to a formal offer presaging a stance of impasse once the offer is finally placed "on-the-record" to justify unilateral implementation of the last offer, the ensuing unfair practice charges found meritorious by the NLRB will clog the courts with petitions for review in hopes of a more favorable, albeit less expert analysis of the bargaining dynamics." (Petition for Writ of Certiorari at 35-36).

In essence, the Union is requesting that this Court create a new exclusionary rule forbidding consideration of relevant, credible, and material evidence in deciding whether impasse exists in negotiations for a collective bargaining agreement. Saunders House submits that this Court should refuse to institute such a

drastic change in the law for the following reasons.

First, the courts have historically taken a restrictive view of exclusionary rules of evidence, adopting such limitations only when there exist compelling reasons to do so. See Trammel v. United States, 445 U.S. 40, 50-51 (1980).¹⁰ As this Court stated in Trammel:

"Testimonial exclusionary rules and privileges . . . must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally

10. See also United States v. Nixon, 418 U.S. 683, 710 (1974) ("exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth"); In Re Dinnan, 661 F.2d 426, 430 (5th Cir. 1981) (requiring "compelling justification" for adoption of new evidentiary privilege).

predominant principle of utilizing all rational means for ascertaining truth.'" 445 U.S. at 50, quoting Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

Here, the only reason advanced by the Union for the adoption of such a rule is its allegation that the judicial system will become engulfed with employers attempting to overcome NLRB unfair labor practice charges by asserting impasse based on off-the-record discussions. As explained above, such a scenario is extremely unlikely since evidence of off-the-record proposals will only be considered after an administrative law judge has found as fact that such proposals actually were made (as the ALJ found in this case). The unlikelihood that such fact-dependent issues will wind up in the appellate courts is demonstrated by the fact

that there appears to be no other appellate court decision regarding this issue, despite the long history of litigation over collective bargaining in this country.

Second, such a rule is directly contrary to the NLRB's own precedent since, under Board law, informal private discussions between Union and management negotiators are relevant considerations in determining whether an impasse has been reached. See Providence Medical Center, supra, 243 N.L.R.B. at 730-31. Moreover, adoption of such a rule would, for no reason, circumscribe the broad scope of inquiry traditionally employed by the Board in evaluating whether impasse has been reached. See Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967), pet. for review denied sub nom. American Federation of

Television and Radio Artists v. NLRB, 395
F.2d 622 (D.C. Cir. 1968).

Finally, to adopt the rule proposed by the Union would make a mockery of the standard consistently applied by the Board and the courts in determining whether an impasse exists -- that there be "no realistic possibility that continuation of discussion at that time would have been fruitful."¹¹ In actuality, the Union is asking for a rule that would require negotiators to view collective bargaining through the proverbial "Looking Glass" and to disregard the clear realities of the situation. Saunders House submits that there is no reason for this Court to create an exclusionary rule that

11. See cases cited at note 3 supra.

would require reality to be ignored in
the collective-bargaining process.

CONCLUSION

For these reasons, the Petition for
Writ of Certiorari should be denied.

Respectfully submitted,

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